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IN THE

Supreme Court of the United States

October Term, 1989

ADVANCED MICRO-DEVICES, INC.,

Respondent,

vs.

JAMES CONSTANT,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTHONY de ALCUAZ
SKJERVEN, MORRILL, MacPHERSON,
FRANKLIN & FRIEL
25 Metro Drive, Suite 700
San Jose, California 95110
(408) 283-1222

Attorneys for Respondent
Advanced Micro-Devices, Inc.

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2800

Questions Presented for Review

1. Whether the manufacture, use and sale of components which could possibly be assembled and programmed to infringe a claim, but which have never been assembled and programmed to infringe, may support a finding of direct infringement, contributory infringement or inducement of infringement.

2. Whether a determination that certain of AMD's products do not infringe the '660 Patent precludes consideration of the validity of that patent when Petitioner contended that other AMD products also infringed the '660 Patent.

3. Whether the District Court properly determined that the doctrine of collateral estoppel prevented Constant from relitigating the decision of the Central District regarding his '635 Patent, which decision was affirmed by the Federal Circuit, and as to which decision Constant's petition for a writ of certiorari was denied.

4. Whether the District Court properly considered the Springer and Bird references to be prior art against the '660 patent given their prior publication dates and obvious relevance to the subject matter of the '660 patent.

5. Whether the District Court properly determined that the level of skill in the art is that of an engineer with a Bachelor of Science degree in electrical engineering and several years of experience given that the only evidence submitted on this issue supports this finding.

6. Whether the District Court properly determined that the '660 patent was invalid for obviousness in light of prior art which disclosed the claimed invention.

7. Whether the District Court properly determined that no evidence of commercial success existed which would support a finding of nonobviousness in light of Constant's failure to submit any such evidence.

8. Whether the District Court erred in determining that the '660 patent was invalid without first conducting a trial upon the issue of AMD's infringement of that patent.

9. Whether the District Court's failure to conduct a trial concerning the infringement of a patent which had previously been found to be invalid denied Petitioner due process of law.

10. Whether the District Court properly construed the claims of the '458 patent in a manner consistent with the construction urged by Constant during prosecution of the patent.

11. Whether the District Court properly found that the claims of the '458 patent contain limitations not included in AMD's products.

12. Whether the questions presented for review are appropriate for review on writ of certiorari when they are not novel or important questions and address only issues of concern to the parties.

Rule 28.1 Statement

Advanced Micro Devices, Inc. has no parents, subsidiaries or affiliates required to be listed pursuant to Rule 28.1. All parties are listed in the caption.

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
Rule 28.1 Statement	iii
Table of Contents	v
Table of Cases and Other Authorities	vii
Statement of Related Cases	ix
Opinion Below	1
Jurisdiction	2
Statement of the Case	3
Summary of Argument	5
Argument	6
I. The District Court properly determined that the 29300 and 29500 families of integrated circuits do not infringe Constant's '660 and '351 patents	6
A. The Standard Review and the Evidence Below	7
B. The District Court Applied the Proper Rule of Law in Holding Constant's '351 and '660 Patents Not Infringed	8
C. The District Court Properly Determined that No Contributory Infringement or Inducement of Infringement Occurred	10
II. The District Court properly considered the validity of the '660 Patent	11

Page

III. The District Court properly determined that the '660 Patent is invalid for obviousness 12

A. Constant's Collateral Estoppel Argument Misconstrues the District Court's Decision 12

B. The District Court Properly Considered Springer and Bird Together as Prior Art Against the '660 Patent 13

C. The District Court Properly Determined the Level of Ordinary Skill in the Art..... 15

D. The District Court Properly Evaluated Obviousness in Light of Springer and Bird 15

E. The Record Contains No Evidence of Commercial Success Sufficient to Support a Finding of Nonobviousness..... 16

IV. The District Court properly found that AMD does not infringe the '458 Patent..... 18

A. The Prosecution History Forecloses the Claim Construction Now Advanced by Constant 18

V. Petitioner has failed to provide any reason why a writ of certiorari should be granted 20

VI. Conclusion 21

Page

TABLE OF AUTHORITIES.

Cases

Advance Transformer Co. v. Levinson, 837 F.2d 1081 (Fed. Cir. 1988) 11
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 7,15
Avia Group Intern., Inc. v. L.A. Gear California, 853 F.2d 1557 (Fed. Cir. 1988) 7,17
Barmag Barmer Maschinenfabrik AG v. Murata Mach. Ltd., 731 F.2d 831 (Fed. Cir. 1984) 7
Cable Electric Products, Inc. v. Genmark, Inc., 770 F.2d 1015 (Fed. Cir. 1985) 17
Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560 (Fed. Cir. 1988), *cert. denied*, 109 S.Ct. 228 (1988) 12,13,15,17
Deepsouth Packing Co., Inc. v. Laitram Corp., 406 U.S. 518 (1972), *cert. denied*, 409 U.S. 902 (1972) . 8,10
DMI, Inc. v. Deere & Co., 802 F.2d 421 (Fed. Cir. 1986) 12
Fed. Trade Comm'n v. American Tobacco Co., 274 U.S. 543 (1927) 20
Graham v. John Deere Co., 383 U.S. 1 (1966) 13,16
Hautau v. Kearney & Trecker Corp., 179 F.Supp. 490 (E.D. Mich. 1959) 9
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 20
Lemelson v. United States, 752 F.2d 1538 (Fed. Cir. 1985) 8
Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861 (Fed. Cir. 1985) 18
Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944), *cert. denied*, 321 U.S. 802 (1944) 8

Page

Mercoid Corp. v. Mid-Continent Invest. Co., 320 U.S. 661 (1944), *cert. denied*, 321 U.S. 802 (1944) . 10
Medtronic, Inc. v. Cardiac Pacemakers, Inc., 721 F.2d 1563 (Fed. Cir. 1983) 17
Murphy v. Hunt, 445 U.S. 478 (1982) 11
National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 20
Nationwide Chemical Corp. v. Wright, 458 F.Supp. 828 (M.D. Fla. 1976), *aff'd*, 584 F.2d 714 (5th Cir. 1978) 10
Paper Converting Machine Co. v. Magna-Graphics Corp., 745 F.2d 11 (Fed. Cir. 1984) 8,9
Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931 (Fed. Cir. 1987), *cert. denied*, 108 S.Ct. 1226 (1988); *cert. denied*, 108 S.Ct. 1474 (1988) 13
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 20
Standard Oil Co. v. American Cyanamid Co., 774 F.2d 448 (Fed. Cir. 1985) 18,19
Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530 (Fed. Cir. 1983) 16
Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044 (Fed. Cir. 1988), *cert. denied*, 109 S.Ct. 75 (1988) .. 15
W.L. Gore & Assoc. v. Garlock, Inc., 721 F.2d 1540 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984) . 16

Statutes

28 U.S.C. §1254(1) 2
35 U.S.C. §103 3
35 U.S.C. §112 13
35 U.S.C. §271(b) 10

Statement of Related Cases

United States Court of Appeals
for the Federal Circuit

No. 88-1101

James Constant v. Advanced Micro-Devices, Inc., *et al.*

No. 88-1414

James Constant v. Advanced Micro-Devices, Inc., *et al.*

No. 88-1196

James Constant v. Robert Hillman

No. 88-1198

James Constant v. Marcian Hoff, *et al.*

No. 88-1197

James Constant v. Hitachi America, Ltd., *et al.*

No. 88-1195

James Constant v. Stephen Wilson; Robert Hillman

No. 89-1432

Advanced Micro-Devices, Inc. v. James Constant

Supreme Court of the United States:

No. 88-308

James Constant v. Advanced Micro-Devices, Inc., *et al.*

No. 88-1356

James Constant v. Advanced Micro-Devices, *et al.*

No. 88-1933

James Constant v. Advanced Micro-Devices, *et al.*

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The United States Court of Appeals for the Federal Circuit affirmed the judgment of the United States District Court for the Northern District of California without opinion. (Petitioner's Appendix at A-2.) The opinions of the District Court are unpublished and are set forth in Petitioner's Appendix (hereinafter "Pet. App.") at B-2 to B-30.

Jurisdiction

The judgment of the court of appeals was entered on October 5, 1989. (Pet. App. at A-2.) The petition for writ of certiorari was filed November 27, 1989. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Statement of the Case

On February 17, 1988, Mr. James Constant sued Advanced Micro-Devices, Inc. ("AMD") and six other companies in the Central District of California, alleging infringement of U.S. Patents Nos. 4,006,351, 4,080,660, and 4,107,458. AMD filed an action for declaratory relief in the Northern District of California, requesting that the court declare these patents invalid, uninfringed, and unenforceable. Mr. Constant counterclaimed in the Northern District alleging infringement. The Central District action was then dismissed as to AMD for improper venue and the Northern District action proceeded.

In his counterclaim, Constant alleged that the AMD 29300 and 29500 families of integrated circuits infringed Constant's U.S. Patents Nos. 4,006,351 and 4,080,660 (hereinafter the " '351 patent" and the " '660 patent"). On January 27, 1989, the District Court granted AMD's motion for summary judgment that the 29300 and 29500 families of integrated circuits do not infringe Constant's '660 or '351 patents.

Constant also contended that AMD's 7910/11 and 79C12/C14 devices infringed his '660 patent. On March 16, 1989, the District Court granted AMD's motion for summary judgment that the '660 patent was invalid for obviousness under 35 U.S.C. §103.

Constant also alleged that AMD's encryption processors infringe his U.S. Patent No. 4,107,458 (the " '458 patent"). In an order dated April 4, 1989, the District Court granted AMD's motion for summary judgment that the '458 patent was not infringed. On that same day the District Court entered judgment for AMD and dismissed Constant's counterclaims.

Petitioner appealed these orders to the United States Court of Appeals for the Federal Circuit, which affirmed without hearing or opinion in a judgment dated October 5, 1989. (Petitioner's App. at A-2.) Constant then filed this petition for writ of certiorari.

Summary of Argument

Petitioner has not presented this Court with any issue that merits review. Each issue turns on the analysis of facts and circumstances unique to this dispute. In essence, Petitioner requests that this Court reconsider the merits of a technologically complex patent matter which was resolved correctly by the District Court and reviewed and affirmed correctly by the Federal Circuit. The issues raised are neither special nor important and are of concern only to the parties.

ARGUMENT

I.

The District Court properly determined that the 29300 and 29500 families of integrated circuits do not infringe Constant's '660 and '351 patents.

The District Court found that Constant's '351 patent claims were limited to recursive filters implemented as a matched clutter filter. (Pet. App. at B-4.) The District Court found that there was no evidence that AMD or any AMD customer had ever used any part from the 29300 or 29500 family in a system which constitutes a recursive filter implemented as a matched clutter filter and that AMD had never encouraged such use. (Pet. App. at B-4 to B-5.) Therefore, the court concluded that AMD does not infringe the '351 patent. (Pet. App. at B-7.)

Similarly, the District Court found that neither AMD nor its customers had ever used parts from AMD's 29300 or 29500 families in a system that operates as claimed in the '660 patent and that AMD had never encouraged such use. (Pet. App. at B-6.) Thus, the District Court concluded that AMD's manufacture, test and sale of these devices did not infringe the '660 patent. (Pet. App. at B-7.)

Constant argues that selling disassembled unprogrammed integrated circuits having a multitude of noninfringing uses constitutes infringement, if the integrated circuits could *conceivably* be assembled and programmed to infringe. (Petition at 18-19.) Constant raises similar arguments concerning inducement of infringement and contributory infringement. Thus, the question presented is whether the manufacture, use and sale of components which *could* possibly be assembled

and programmed to infringe a claim, but which have *never* been assembled and programmed to infringe, constitutes direct infringement, contributory infringement, or inducement of infringement.

A. The Standard Review and the Evidence Below.

The grant of summary judgment below was proper unless Constant can demonstrate that there is sufficient evidence in the record for a jury to return a verdict for him. If his evidence is merely colorable, or is not significantly probative, summary judgment was proper. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986); *Avia Group Intern., Inc. v. L.A. Gear California*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). "[M]ere denials or conclusory statements in briefs do not create a dispute regarding a material fact." *Barmag Barmer Maschinen fabrik AG v. Murata Mach. Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

Constant has not brought *any* evidence before this court. The Petitioner's Appendix contains only the opinions below. Constant relies entirely on "conclusory statements" in his brief to support his assertion of error.

If reference is made to the record below, that record indicates that AMD and Constant agree on the following facts:

1. AMD manufactures, among other things, the 29300 and 29500 families of integrated circuits. Devices from these families can be assembled and programmed to perform a *nearly infinite* number of functions. (Appellee's Fed. Cir. App. page 145.)

2. For purposes of the summary judgment motion, AMD stipulated that its products *could* also be assembled to perform the functions claimed in Constant's patents. (Appellee's Fed. Cir. App. page 180.)

3. Nobody has ever assembled and programmed these products in the manner claimed in the '660 or '351 patent. Declaration of Philip Freidin in Support of Advanced Micro Devices' Motion for Summary Adjudication of Issues and for Sanctions Under Rule 11. (Appellee's Fed. Cir. App. pages 145, 146.) Constant Deposition, 29:15-32:12, 42:2-26. (Appellee's Fed. Cir. App. pages 159-163.)

B. The District Court Applied the Proper Rule of Law in Holding Constant's '351 and '660 Patents Not Infringed.

The Federal Circuit has held that "infringement can occur only when the claimed combination has been assembled and is available for use." *Lemelson v. United States*, 752 F.2d 1538, 1548 (Fed. Cir. 1985). Similarly, in *Deepsouth Packing Co., Inc. v. Laitram Corp.*, 406 U.S. 518, 528 (1972), *cert. denied*, 409 U.S. 902 (1972), this Court held "a patent on a combination is a patent on the assembled or functioning whole, not on the separate parts" (quoting from *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944), *cert. denied*, 321 U.S. 802 (1944). Accordingly, only systems including *integrated circuits that are assembled and programmed* to perform in the manner claimed can infringe the '351 and '660 patents. The evidence below showed that nobody has ever assembled and programmed AMD products in this manner.

Constant cites *Paper Converting Machine Co. v. Magna-Graphics Corp.*, 745 F.2d 11 (Fed. Cir. 1984) for the proposition that the manufacture and sale of integrated circuits capable of a multitude of uses constitutes infringement if they *could* possibly be assembled and programmed in an infringing manner. In fact, *Paper Converting* is inapposite. In *Paper Converting*, the allegedly infringing apparatus had only one realistic and intended use, which infringed a patent.

In the present case, the District Court found (Pet. App. at B-4) and Petitioner concedes (Petition p. 15) that devices in AMD's 29300 and 29500 families of integrated circuits have a multitude of uses and could be programmed to perform an infinite number of operations. Thus Constant's reliance upon *Paper Converting* is misplaced.

Constant also argues that "systems" suggested in AMD's literature "are specially designed for programs implementing infringing algorithms (FFT, IIR, FIR, division, multiplication)." (Petition at 13.)[1] The '351 and '660 patents do not claim all FFT, IIR, FIR, division and multiplication algorithms. If the claims cover all such algorithms, they are plainly invalid. Division and multiplication, for example, clearly predate Constant's patents. More importantly, even if AMD did teach customers how to infringe Constant's patents (which it did not), if nobody infringed the patents, there is no infringement. *Hautau v. Kearney & Trecker Corp.*, 179 F.Supp. 490, 492 (E.D. Mich. 1959). Petitioner's reference to documents discussing purported infringing uses (Petition pp. 5-7) cannot support a contrary finding. The decisions below recognized this and were correct.

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[1] FFT, IIR and FIR are acronyms for "fast Fourier transform", "infinite impulse response" and "finite impulse response", respectively. "Fast Fourier transforms" are used to provide a spectral analysis of a signal. "Infinite impulse response" pertains to filters which respond to an impulse input signal by providing an output signal that does not decay to zero. "Finite impulse response" refers to filters which respond to an impulse input signal by providing an output signal which eventually decays to zero.

C. The District Court Properly Determined that No Contributory Infringement or Inducement of Infringement Occurred.

In *Deepsouth, supra*, this Court stated "In a word, if there is no [direct] infringement of a patent, there can be no contributory infringer." 406 U.S. at 526, quoting *Mercoid Corp. v. Mid-Continent Invest. Co.*, 320 U.S. 661 (1944), *cert. denied*, 321 U.S. 802 (1944). Accordingly, since no evidence could support a finding of direct infringement of the '351 and '660 patents there can be no finding of contributory infringement.

It is also clear that "(p)roof of inducement of infringement under 35 U.S.C. 271(b) requires proof of direct infringement of all of the elements of the claim." *Nationwide Chemical Corp. v. Wright*, 458 F.Supp. 828, 839 (M.D. Fla. 1976), *aff'd* 584 F.2d 714 (5th Cir. 1978). The decisions below were correct and no evidence which would support a contrary conclusion exists.

II.

The District Court properly considered the validity of the '660 Patent.

The District Court's order of January 27, 1989 (Pet. App. at B-2) found the '660 Patent not infringed by the 29300 and 29500 families of AMD products. Constant also contended that other products (AMD's 7910/11 and 79C12/C14 products) infringed the '660 Patent and pursued a motion for summary judgment upon that claim after the District Court's January 27, 1989 decision. (See, Petition p. 49.) After the January 27, 1989 order, the District Court found that the '660 Patent was invalid. (Order dated March 16, 1989, Pet. App. at B-10.) The District Court thus determined that the '660 Patent was invalid while Constant's infringement claims relating to other AMD devices were pending. The question of the validity of the '660 patent was not moot because the parties continued to have a "legally cognizable interest in the outcome." *Murphy v. Hunt*, 445 U.S. 478, 481 (1982). *Advance Transformer Co. v. Levinson*, 837 F.2d 1081 (Fed. Cir. 1988), cited by Constant, involved an entirely different procedural situation and is inapposite.

III.

The District Court properly determined that the '660 Patent is invalid for obviousness.

The District Court held Constant's '660 Patent to be obvious in light of the Bird patent (U.S. Patent No. 3,553,651) and the Springer article. (Pet. App. at B-17 and B-18.) Contrary to Petitioner's assertion, Constant's '635 Patent was not relied upon as prior art in the District Court's determination of obviousness. *Id.* The determination of the District Court was correct and no evidence exists which could support a contrary conclusion.

A. Constant's Collateral Estoppel Argument Misconstrues the District Court's Decision.

Constant argues that the District Court erred in applying the doctrine of collateral estoppel. Constant misconstrues the District Court's decision. The District Court merely recognized that certain facts relating to the '635 patent were determined in *Constant v. Advanced Micro-Devices,* 848 F.2d 1560 (Fed. Cir. 1988) (hereinafter cited as *Constant v. AMD*) and recognized that Constant is collaterally estopped from disputing those facts. The District Court did *not* hold that the '635 patent was prior art. The District Court did *not* hold that the mere fact that the '635 patent was obvious meant that the '660 patent was obvious. Rather, the Court looked to *Constant v. AMD* for its factual determination of what Springer disclosed and the differences between Springer and Claim 1 of the '635 patent. In its analysis of obviousness, the District Court correctly applied the test set forth in *DMI, Inc. v. Deere & Co.*, 802 F.2d 421, 425 (Fed. Cir. 1986). (Pet. App. at B-13 *et seq.*) *DMI, Inc.* sets forth the factual inquiry

described by this Court in *Graham v. John Deere Co.*, 383 U.S. 1 (1966). The District Court properly applied the doctrine of collateral estoppel.

B. The District Court Properly Considered Springer and Bird Together as Prior Art Against the '660 Patent.

The Bird LIFO circuit is a "system for the digital time scale inversion of signals" as set forth in Claim 1 of the '660 patent. Springer's relevance is made clear, *inter alia*, by *Constant v. AMD*. No authority supports Constant's contention that the District Court erred because it did not explicitly state a reason for combining the references.

Constant argues that if Bird and Springer do not perform the *exact* function in his '660 patent, Bird and Springer cannot be considered prior art. (Petition p. 34.) Constant asserts that this rule is mandated by 35 U.S.C. 112.

There are at least three flaws with this argument:

1. Constant is wrong on the law. Section 112, paragraph 6 does not define what is prior art. *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987), *cert. denied*, 108 S.Ct. 1226 (1988); *cert. denied*, 108 S.Ct. 1474 (1988), cited by Constant, simply has nothing to do with this question.

2. It is completely contrary to *Constant v. AMD*, which held that Springer was prior art against an almost identical patent claim.

3. The record below shows that Bird *does* perform time inversion as claimed by Constant. Data arrives in a first order and is provided in the time reverse order. (Appellee's Fed. Cir. App. p. 297.)

Constant next argues (Petition p. 35) that Springer and Bird are not prior art because the District Court should have considered other references to be more pertinent. Constant alleges that these other references specifically teach filters and Springer and Bird do not.

There is no genuine issue of material fact on this issue because:

1) The '660 patent is not limited to filters.

2) The Federal Circuit has already considered and rejected this argument. Specifically the Federal Circuit held that Springer was prior art against the '635 patent. *Constant v. AMD*, 848 F.2d at 1570. If Springer and Bird are prior art against the '635 filter patent, then Springer and Bird *must* be prior art against the '660 patent which is broader than the '635 filter patent.

Constant next argues (Petition at pp. 37-38) that the Springer and Bird memories operate at the same input and output rate (clock rate). Constant contends that this feature makes the Springer and Bird memories unsuitable for use in the '635 and '660 filters, all of which require low input rates and high output rates to obtain pulse compression. There is no genuine issue of material fact on this issue because:

1) The '660 patent is not limited to any type of filter.

2) Constant's argument is contrary to the Federal Circuit's holding that Springer rendered obvious the '635 patent.

The Springer and Bird articles are prior art, and were correctly considered by the District Court.

Constant's contention that the District Court employed numerous references "as a mosaic to recreate a facsimile of the claimed invention," (Petition p. 40) is refuted by the record. The District Court combined *two* references. One (Springer) disclosed every element but

one of the claimed device. The other (Bird) provided the missing element. (Pet. App. at B-17 to B-19.) This is hardly the mosaic of antithetical references discussed in *Uniroyal Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1051-1052 (Fed. Cir. 1988), *cert. denied*, 109 S.Ct. 75 (1988), cited by Constant.

C. The District Court Properly Determined the Level of Ordinary Skill in the Art.

Constant contends that the District Court erred in its finding of fact concerning the level of ordinary skill in the art. AMD submitted evidence to the District Court in the form of a Declaration by Philip Freidin concerning the level of skill in the art. (Appellee's Fed. Cir. App. page 267.) Constant never submitted contrary evidence. The District Court properly acted on the only evidence it had before it. There is no evidence in the record to support the conclusions in Constant's brief. Accordingly, there is no evidence to support a contrary finding and the District Court's order was proper. *Anderson v. Liberty Lobby, Inc., supra.*

D. The District Court Properly Evaluated Obviousness in Light of Springer and Bird.

The Federal Circuit has previously held that the *only* difference between Springer and Constant's '635 patent is that Springer is not a recursive filter implemented as a matched clutter filter. *Constant v. AMD*, 848 F.2d at 1570. Claim 1 of the '660 patent is *not* limited to a recursive filter implemented as a matched clutter filter. The only limitation present in '660 Claim 1 that is not present in '635 Claim 1 is time inversion. Bird contains *all* of the relevant subject matter disclosed in the Springer *plus* time inversion. (See, Table I, Appellee's Fed. Cir. Brief.) Thus, the '660 patent must be obvious in light of Bird.

More importantly, the record (Pet. App. at B-10 to B-20) reflects a careful and correct analysis of validity using the method of analysis set forth in *Graham v. John Deere Co., supra.* No reason is given for this Court's reconsideration of that analysis.

E. The Record Contains No Evidence of Commercial Success Sufficient to Support a Finding of Nonobviousness.

Constant asserts that the District Court erred by not considering "secondary considerations", and that if AMD's 7910/11 and 79C12/C14 were found to infringe the '660 patent, evidence of "secondary considerations" would support validity. (Petition p. 48.) Constant cites *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983), *W.L. Gore & Assoc. v. Garlock, Inc.*, 721 F.2d 1540, 220 U.S.P.Q. 303 (Fed. Cir. 1983), *cert. den.*, 469 U.S. 851 (1984) and a number of other cases in support of this proposition. Constant also argues that the issue of infringement of the '660 patent must be decided before the issue of obviousness of that patent is reached. (Petition p. 48.) Constant's theory appears to be that if he were permitted to demonstrate that AMD's 7910/11 and 79C12/C14 products infringe the '660 patent, such infringement could constitute evidence of secondary considerations. Constant is incorrect because:

1) Constant never proffered any evidence of commercial success.

2) Constant could have proffered evidence that the 7910/11 and 79C12/C14 devices infringe his '660 patent prior to the determination of invalidity. He did not.

3) Constant never proffered any evidence that the 7910/11 or 79C12/C14 devices were commercially successful.

4) Even if there were some evidence in the record that these devices were successful (which there isn't), Constant never proffered evidence that there

> was a nexus between his invention and such commercial success as required by *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1027 (Fed. Cir. 1985).

Therefore, the District Court correctly determined that the "objective evidence does not support a finding of nonobviousness." (Pet. App. at B-19.)

Constant argues that "The court's judgment that the '660 patent is invalid before a full adjudication of the infringement of that patent by AMD was made is error and deprives Petitioner's due process." (Petition p. 50.) In response to a similar argument by Constant, the Federal Circuit in *Constant v. AMD* stated:

> [I]t is unambiguously clear that federal judicial proceedings, with their extensive notice, opportunity to be heard, and procedural protections, satisfy the constitutional requirement of procedural due process required for the invalidation of a patent. [848 F.2d at 1565.]

Constant received all such notice, opportunity to be heard and procedural protections. *See, also, Avia Group International, Inc., supra.*

There is no rule requiring trial courts to determine validity *and* infringement, instead of validity alone on summary judgment. However, there is a preference for determining both validity and infringement if a case goes to trial. *See, Medtronic, Inc. v. Cardiac Pacemakers, Inc.*, 721 F.2d 1563, 1582 (Fed. Cir. 1983). Contrary to Constant's assertion (Petition p. 3) there was no "bench trial" in this matter, so even that preference is inapplicable. The rule asserted by Constant requiring an infringement trial upon a patent previously found invalid defies reason. It is assuredly within the District Court's inherent power to regulate litigation before it to refuse to conduct such a trial. It cannot be reasonably asserted that the District Court abused its discretion in refusing to do so.

IV.

The District Court properly found that AMD does not infringe the '458 Patent.

A. The Prosecution History Forecloses the Claim Construction Now Advanced by Constant.

Constant attacks the District Court's ruling that the '458 claims must be construed in light of arguments made by Constant before the U.S. Patent and Trademark Office.

In its order, the District Court held that Constant's claims must be interpreted in light of the file history. (Pet. App. at B-21 to B-29.) Constant argues that AMD cannot use the doctrine of "file wrapper estoppel" in construing the '458 claims.

Constant argues "once literal infringement is found, the doctrine of file wrapper estoppel is inapplicable." (Petition p. 55.) Constant apparently fails to recognize that to determine the issue of literal infringement, claims construction is necessary. Constant cites *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861 (Fed. Cir. 1985). *Loctite v. Ultraseal* states that to ascertain the true meaning of disputed claim language, resort should be made to the claims at issue, the specification, and the prosecution history. 781 F.2d at 867. The court in *Loctite* performed claims construction in its determination of literal infringement. Thus, in the determination of literal infringement the meaning given to terms in a claim depends on the meaning that was attached to the claims during the prosecution. *Accord, Standard Oil Co. v. American Cyanamid Co.*, 774 F.2d 448, 452 (Fed. Cir. 1985).

Even if Mr. Constant is correct that "file wrapper estoppel" is not the name of the applicable doctrine, the principles involved in the District Court's opinion below are completely correct, *i.e.*, the prosecution history limits the interpretation of claims so as to exclude any interpretation that may have been specifically disclaimed or disavowed during prosecution in order to obtain claim allowance. *Standard Oil Co. v. American Cyanamid Co., supra*, 774 F.2d at 452.

Constant specifically disclaimed the interpretation of the '458 claims that he now urges. Claim 17 of the '458 patent includes the following elements:

> a first memory means for storing a first signal S, said first memory means having storage locations for n words Sn;
>
> a second memory means for storing a second signal K, said second memory means having storage locations for n words Kn. . . .

Constant distinguished the '458 claims over the prior art by arguing that the above claim language meant that the first and second memory means *each* required a *plurality* of locations. See the Amendment dated January 24, 1978. (Appellee's Fed. Cir. App. pages 321-324.) During depositions, Constant admitted as much. (Appellee's Fed. Cir. App. pages 327-328.)

Constant now asserts that his first and second memory means do *not* require a plurality of locations. Such claim interpretation is foreclosed by the file history. Constant's contention that "literal infringement is present" is also incorrect. Construed in light of the prosecution history, the claims are not infringed.

V.

Petitioner has failed to provide any reason why a writ of certiorari should be granted.

This Court has stated, " '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' " *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

Petitioner's claims affect only the parties involved, and are meritless. As such, this Court should " 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations.' " *National Labor Relations Board v. Pittsburgh S.S. Co.,* 340 U.S. 498, 503 (1951), (quoting *Fed. Trade Comm'n v. American Tobacco Co.,* 274 U.S. 543, 544 (1927). *Accord,* Sup. Ct. Rule 17(c). Although the Petition gives lip service to the considerations governing review on certiorari set forth in Rule 17, the Petitioner fails entirely to demonstrate a conflict between the rulings below and those of any other Court and has similarly failed to demonstrate *any* departure from the "usual proceedings."

VI.

Conclusion

Petitioner would have this Court reconsider the merits of a complex patent matter, correctly decided below, of no interest to anyone other than the parties. This Court should decline to use its limited resources to do so.

For the above reasons, the Petition should be denied.

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Respectfully submitted,

ANTHONY de ALCUAZ
SKJERVEN, MORRILL, MacPHERSON,
FRANKLIN & FRIEL
25 Metro Drive, Suite 700
San Jose, California 95110
Phone: (408) 283-1222

Attorneys for Plaintiff
Advanced Micro-Devices, Inc.